(10)

No. 98-1682
In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

UNITED STATES OF AMERICA, ET AL.,
APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF OF AMICUS CURIAE THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

In support of the Appellee

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a non-profit, non-partisan organization in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of freedom of speech and press from threats in many different forms. The Center pursues that mission in several ways, notably by filing amicus curiae briefs in cases that raise important free expression issues. The Center, joined by the Media Institute, filed such a brief with the district court in this case.

[1]Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

SUMMARY OF ARGUMENT

The district court correctly ruled that Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. V., Stat. 136, "is a content-based restriction" on fully protected expression. *Playboy Entertainment Group, Inc. v. U.S.*, 30 F. Supp. 2d 702, 14 (D. Del. 1998). The court below was also correct in finding that this law "restricts a significant amount of protected speech" -- specifically because it targets "solely sexually explicit programming." *Id.* at 715, 718. The district court ruled in complete accord with this Court's free speech and press holdings that such material does not forfeit First Amendment protection because of its content. *Id.* at 714. Even assuming, as the district court did, that such a statute might possibly serve a compelling governmental interest, the ready availability of less restrictive alternatives -- most notably the content-neutral alternative which Congress itself recognized and

endorsed in a companion provision of the same Act -- renders the challenged statute unconstitutional. *Id.* at 717, 718.

Reliance upon such an alternative, moreover, reflects the soundest and most basic of First Amendment principles -- that it is the speaker and the listener (or the viewer), and not the Government save in the most exigent circumstances, who properly decide what messages are to be communicated or received, when and by what means. For these reasons, amicus respectfully urge the affirmance of the judgment below.

The district court also addressed the nature of the Government's asserted interest in barring the transmission of sexually explicit material that could be accessed by young viewers. *See id.* at 716. While each of several claimed interests might, standing alone, not have seemed "compelling", the court below recognized arguendo, by aggregating those interests, a potentially valid regulatory rationale. *Id.* at 717. Amicus respectfully takes issue with that analysis, since it rests heavily

on this Court's very narrow judgment in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Reliance here on *Pacifica* is troubling for four reasons: First, the statutory provision invoked in *Pacifica* -- a ban on "indecency" -- has an understood meaning that the wholly different term "sexually explicit" lacks. *See id.* at 740. Second, the medium to which *Pacifica* applied was licensed broadcasting, not cable; this Court has consistently disabled attempts to expand *Pacifica* to other media, including cable. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

Third, the nature of the sanction upheld in *Pacifica* was markedly less severe and less pervasive -- both for the broadcaster and for the listener/viewer -- than is the sweeping restriction which is the focus of this case. *See Pacifica*, 438 U.S. at 730. Finally, and most important, the very premises on which *Pacifica* rests have been steadily eroded in the last two decades, leaving grave doubt whether it should today be reaffirmed even

in the narrow context to which it originally applied. *See e.g., Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622 (1994); *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115 (1989); *Bolger v. Youngs Drug Products Corp.*,463 U.S. 60 (1983). Thus amicus respectfully urges this Court to assess with utmost care the district court's rationale for positing a compelling government interest behind the challenged restriction.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE CHALLENGED STATUTE IS INVALID BECAUSE IT RESTRICTS A SUBSTANTIAL AMOUNT OF PROTECTED EXPRESSION, DESPITE THE AVAILABILITY OF A MUCH LESS RESTRICTIVE ALTERNATIVE.

Central to the judgment of the district court was its early and clear recognition that the challenged statute severely restricts protected expression. *Playboy,* 30 F. Supp. 2d at 714, 718. The fact that the medium is cable, and that the targeted material is "sexually explicit", in no way dilute that protection. *Id.* at 714. As for the medium, this Court's *Turner* decisions

make clear that "heightened First Amendment scrutiny" is the appropriate standard even for review of content-neutral measures. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 640-41 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 186 (1997) ("*Turner II*"). Moreover, when the restriction is clearly content-based, as the district court found to be the case here, the need for the most rigorous First Amendment review is even clearer. *Playboy,* 30 F. Supp. 2d at 715.

The content, which this law targets, is also unmistakably protected. Decisions of this Court have emphasized repeatedly that expression which is "sexually explicit", but is not obscene or does not contain child pornography, and falls within none of the other narrow exceptions, is fully protected under the First Amendment. *See Jenkins v. Georgia,* 418 U.S. 153 (1974). While dissemination of such material to minors may be regulated, *Ginsberg v. New York,* 390 U.S. 628 (1968),

measures which -- even for the most appealing of reasons -- deny adult access to protected material are clearly invalid, *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). The First Amendment has no tolerance for a law which -- to paraphrase *Butler* -- "reduces the adult population . . . to [viewing] only what is fit for children." *Id.* at 383.

The impact on expression here is far from incidental or peripheral. The district court found, indeed, that the challenged provision "restricts a significant amount of protected speech." *Playboy*, 30 F. Supp. 2d at 718. Of the responses a cable operator could conceivably make to such a scrambling requirement, by far the likeliest course (indeed, probably the only technically workable option) would be time-channeling -- a choice which, the district court found, "amounts to removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* The drastic and sweeping nature of the challenged restriction --

quite as much in withholding protected material from the viewer as in curbing the cable operator's speech -- is thus a key to the district court's judgment.

Given the scope of such a ban on protected expression, the availability of less restrictive alternatives becomes crucial. In most cases where a speaker invokes possibly benign alternatives, speculation is not only appropriate but essential. Rarely does a law that unduly curbs speech also endorse a less drastic alternative. Here, however, speculation is quite unnecessary. Almost uniquely, the very alternative that "undercut[s] significantly" the challenged restriction, *Boos v. Barry*, 485 U.S. 312, 329 (1988), is to be found in the companion provision of the very statute in issue. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 133: § 504, 100 Stat. 136.

Such an alternative is much more clearly available here than, for example, in the closely analogous context of attempts to bar "indecent" telephone calls. In *Sable Communications*,

Inc. v. FCC, 492 U.S. 115, 129 (1989), this Court rejected such curbs, in part because "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." Here, to the contrary, far from foreclosing less restrictive alternatives, Congress *endorsed* the very alternative that renders unnecessary the more drastic measure challenged here. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 133: § 504, 100 Stat. 136.

The lockbox alternative is not merely a technically preferable solution. The opportunity for viewers to ask that cable operators selectively block unwelcome material also fits far better in the framework of our Bill of Rights. It has long been the central premise of our First Amendment that, with few and narrow exceptions, it is for the speaker and the listener or viewer to determine what messages shall be communicated,

when and by what media. The availability of a lockbox option clearly reflects that belief, since it enables the listener/viewer to bar receipt of material he or she may not wish, without depriving any other adult viewer of that same material. Where such an option exists, this Court's consistent judgment in First Amendment cases like *Boos v. Barry* make clear that, it must be favored over more restrictive -- indeed, by definition *unnecessarily* restrictive -- measures by which to serve even a valid underlying interest.

II. THE DISTRICT COURT GAVE UNDUE DEFERENCE TO THE ASSERTED GOVERNMENT INTEREST, BY RELIANCE ON THE *PACIFICA* DOCTRINE.

The district court would not have reached the issue of less restrictive alternatives had it not assumed the existence of a valid regulatory interest. While none of the asserted interests, standing alone, might have sufficed, their aggregation seemed to the court below sufficient -- "three interests which in sum can be labeled 'compelling.'" *Playboy*, 30 F. Supp. 2d at 717. That

cour reluctance to identify as constitutionally adequate any one of those interests, standing alone, should invite caution in any further analysis of the Government's claims. Moreover, the district court's deference to the several asserted interests rested almost totally on this Court's narrow judgment in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Amicus respectfully urges that, to the extent the claimed government interests receive this Court's attention, reliance on *Pacifica* be disavowed.

We offer four specific grounds for distinguishing *Pacifica* in this setting. First, the expressive medium here is cable, not the licensed broadcasting to which *Pacifica* has been uniquely applied. Cases such as *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 127 (1989), stressed the "emphatically narrow holding" of *Pacifica*. When it came to cable, this Court continued that limiting process, in *Turner I*, 512 U.S. at 639: "Application of the more relaxed standard of scrutiny adopted

in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation." That rejection of *Pacifica* accompanied a regulation which the *Turner I* plurality, at least, deemed to be content-neutral. *See* 512 U.S. at 640-41. Where the regulation is content-based, as the district court correctly ruled in this case, the inapplicability of *Pacifica* seems far more obvious.

Most recently, in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), this Court reemphasized the narrowness and medium-specific nature of *Pacifica*, and its clear inapplicability to the Internet. *See id.* at 868-70. Any suggestion that *Pacifica* might justify measures to ban from cable any type of material deemed inappropriate for young viewers is thus clearly incompatible with this Court's most recent and pertinent ruling. *See id.* at 875 (holding that *Pacifica* does not support the proposition that "the level of discourse reaching the mailbox simply [should] be limited to that which

would be suitable for a sandbox") (internal quotations marks and citation omitted).

Nor, given the dramatically different nature of the sanctions, is anything in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), to the contrary. Indeed, the only one of the three challenged provisions that this Court sustained in *Denver Area* was wholly permissive in nature, while the provision most closely analogous to the mandatory curb now before the Court was deemed clearly violative of First Amendment rights of both viewers and cable operators. *Compare id.* at 743-47 (holding that "the permissive nature of the provision [which permits cable operators to decide whether or not to broadcast sexually explicit programs on leased access channels] . . . is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating . . . First Amendment interests"), *with id.* at 755-60 (finding "separate and block"

requirements "overly restrictive, 'sacrific[ing]' important First Amendment interests for too 'speculative a gain'")(alteration in original, citation omitted). Thus, to the extent that *Denver Area* bears upon the present case, it reinforces the district court's ruling.

Second, the nature of the substantive standard in this case is also profoundly different. *Pacifica* sustained very limited application of a ban on "indecent" material, a term that had been in federal law regulating broadcasters from the very beginning and that over time acquired an accepted or understood meaning. *See Pacifica*, 438 U.S. at 735-38; *Reno*, 521 U.S. at 867. Nothing in this Court's decisions offers any comparable basis for sustaining even a limited ban on "sexually explicit" material in any medium, much less in cable.

To the contrary, "sexually explicit" but non-obscene material is fully protected by the First Amendment. *See Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (holding that "nudity

alone is not enough to make material legally obscene under the *Miller* standards" and, therefore, "outside the protection of the First and Fourteenth Amendments . . . ."). Moreover, the absence of any definition in the statute of this central term—one which defines coverage both of cable operators and of particular material that they transmit—further undermines any *Pacifica*-based claim of deference to this quite different standard.

Third, the marked difference in the nature of the sanctions should also be dispositive. The sanction this Court allowed in *Pacifica* was quite limited. *See Pacifica*, 438 U.S. at 750 n.28 (noting that "the Commission has not unequivocally closed even broadcasting to speech of this sort"). Indeed, when this Court was asked to extend *Pacifica* to "indecent" telephone messages, that very difference proved to be crucial: "*Pacifica* is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material." *Sable*, 492 U.S. at 127. Again, in *Reno*, this Court invoked the

very limited nature of *Pacifica*'s sanction as a basis for distinction: "The [Commission's] order . . . targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium." *Reno*, 521 U.S. at 867. As the district court described in considerable detail, the scope and reach of the sanction challenged here are dramatically broader and more pervasive in reach as to both cable operators and viewers. *See Playboy*, 30 F. Supp. 2d at 711-13, 717-18. That court concluded that the challenged law "restricts a significant amount of protected speech." *Id.* at 718. If cable operators complied with the restrictions in the likeliest way, the inevitable effect would be "the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all the households on a cable system." *Id.* Such a contrast to the sanctions in *Pacifica* is much more than simply a difference of

degree, and serves further to attenuate the potential force of *Pacifica* as support for the regulatory interests advanced here.

Finally, and most basically, amicus respectfully urges that the passage of time and vast changes in technology have gravely undermined *Pacifica* even in the limited context of licensed broadcasting. *Pacifica*, like *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), before it, relied heavily upon concepts of "scarcity" which were of doubtful value at the time, (*see Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 393-94), and which have long since vanished from the real world of mass communications. *Cf. Reno*, 521 U.S. at 868-70 (holding that cases such as *Pacifica* and *Red Lion* "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet).

There is a special irony in suggesting that any notion of "scarcity" should apply to cable, with its nearly infinite range of available channels, at a time when few even of our largest

metropolitan areas have more than two daily newspapers—and when, as this Court observed in *Reno*, "any person or organization with a computer connected to the Internet can 'publish' information." 521 U.S. at 853. Yet continued deference to judgments like *Pacifica* and *Red Lion* seems to reflect a belief that "scarcity" in mass media persists at the close of the century.

Pacifica also rested on at least two other premises—that the privacy of the home should be shielded from invasive affronts by offensive material, and that children deserve special protection from such material. *See Pacifica*, 438 U.S. at 748-50. The passage of time has surely not—in contrast to the "scarcity" concept—made such values less tenable. What has happened, however, is that dramatic changes in communications technology, together with a higher confidence in parental choice and control of family viewing and listening, have undercut

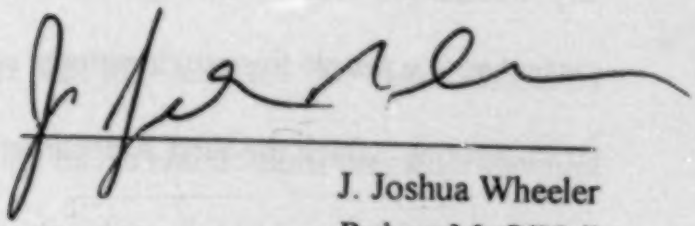
Pacifica's premises to a comparable degree. *See Reno*, 521 U.S. at 870.

As the present case admirably illustrates, technology now enables mass media to serve the First Amendment imperative of not "reduc[ing] the adult population [to viewing] . . . only what is fit for children." *See Sable*, 492 U.S. at 128 (internal quotation marks and citations omitted). Options like the lockbox, which Congress specifically recognized and endorsed in this very statute, now offer families (at least on cable) discrete and selective viewing choices that simply did not exist at the time of *Pacifica*. *See Playboy*, 30 F. Supp. 2d at 718- 20. If, as the district court concluded, the privacy of the home and the sensitivities of young viewers can be fully ensured by means that do not impinge on adult choices among protected material, the need for such cruder and broader sanctions simply disappears. *See id.*

Finally, this Court addressed similar concerns in *Reno*. Early in its opinion, the Court candidly recognized the extensive availability of sexually explicit material on the Internet. *See Reno*, 521 U.S. at 853-55. Nonetheless, the Court concluded that the means and the standard Congress had adopted to protect young people from such material could not withstand the strict scrutiny, which the First Amendment required. *See id.* at 849. The issue posed here is strikingly similar, and should be resolved in comparable fashion. Without in any way denigrating the importance of the privacy of the home or the needs of young viewers, amicus urges that *Pacifica* provides no sounder basis for broadly restrictive sanctions on cable communication than for such curbs on Internet speech.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the affirmance of the judgment of the district court.



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